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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eighth Circuit properly reversed a judgment for the defendant by the District Court in a Title VII and a 42 U.S.C. §1983 action involving a claim of discriminatory discharge and demotion because of race? Plaintiff established a prima facie case under *McDonnell Douglas /Burdine*, and proved that defendant's proffered legitimate, non-discriminatory reasons for the discharge and demotion were pretextual. Could the trial court ignore the inference of racial discrimination established by the prima facie case and deny recovery on the grounds that some reason unsupported by the evidence and undisclosed by the employer was the reason for the adverse action?

2. Whether the holding of the Court of Appeals for the Eighth Circuit is in conflict with the First and Seventh Circuit's decisions on the same matter and applicable decisions of this Court?

### LIST OF PARTIES TO THE PROCEEDINGS

1. St. Mary's Honor Center, Petitioner herein and Defendant in District Court.
2. Steve Long, Petitioner herein and Defendant in District Court.  
  
St. Mary's Honor Center is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources.
3. Melvin Hicks, Respondent herein and Plaintiff in the District Court.

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No. 92-602

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1992

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ST. MARY'S HONOR CENTER and STEVEN LONG,  
*Petitioners,*

vs.

MELVIN HICKS,  
*Respondent.*

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**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**STATEMENT OF THE CASE**

Defendant St. Mary's Honor Center is an adult correctional institution of the Missouri Department of Corrections which is an agency of the State of Missouri and defendant Steve Long was the Superintendent of the facility.

Respondent Melvin Hicks is an African-American (black) who was demoted from his supervisory position as shift commander at St. Mary's Honor Center and subsequently discharged by the defendants. He filed suit in federal court alleging a violation of Title VII and 42 U.S.C. §1983.

Note: (P - \_\_) refers to Petition For Writ of Certiorari; (A- \_\_) refers to Appendix of Petition For Writ of Certiorari.



Plaintiff established that he was a member of a minority group, that he was qualified for his supervisory position, that he was first demoted and then fired and was replaced by a white person. Defendants stated plaintiff was demoted and discharged because of the severity and accumulation of violations of institutional rules.

The district court held that "Plaintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual. . . ." (A-26) The court then went on to conclude that Hicks had not proven that the "crusade [to discharge him] was racially rather than personally motivated." (A-27)

The Court of Appeals had before it the transcript of the trial, the extensive briefs of the parties and it reviewed the findings of the trial court concerning the proffered reasons for the adverse actions against plaintiff.

It determined that the defendants had never contended that the adverse actions against plaintiff were taken because of personal motivation. The Eighth Circuit stated, ". . . it was improper for the district court to assume — without evidence to support the assumption — that defendants' actions were somehow 'personally motivated' . . . defendants simply never stated that personal motivation was a reason for their actions or offered evidence to support such a claim." (A-10).

Next the Court reviewed the findings of the trial court on the issue of pretext and at the same time explored the extensive findings of the district court which could support a finding of racial discrimination.

On March 3, 1984 two white transportation officers submitted a written report to plaintiff's immediate supervisor, Captain Powell, about violations of institutional rules by employees under plaintiff's supervision. Plaintiff, the only remaining black

shift commander<sup>2</sup> was suspended for five days on the grounds that it was Powell's policy to discipline only the shift commander for violations occurring during his shift (A-3). White shift commanders were not disciplined for rule violations which occurred on their shift by employees under their supervision (A-5).

On March 19, 1984 plaintiff permitted two correctional officers to use a St. Mary's vehicle for an emergency. Neither the correctional officers nor the control center officer logged the use of the car despite a rule requiring such logging. They were not disciplined, however, plaintiff was demoted (A-3). Ratliff and Slinkard, the two white transportation officers who had reported the March 3rd incident, did not log their use of a vehicle in violation of the rules and were not disciplined.

On March 21, 1984 plaintiff investigated a fight between two inmates and drafted a memorandum notifying Powell of the fight and injury to an inmate. Plaintiff directed the officer who took the injured inmate to the hospital to write a report. Powell then charged plaintiff with failing to investigate the fight, and this led to plaintiff's demotion on April 19, 1984 (A-4).

After his demotion Plaintiff requested and obtained permission to leave, at this point Powell followed plaintiff and provoked him into acting irrationally (A-4) (P-7). This led to a recommendation from the disciplinary board for a three day suspension which Long ignored and instead effectively recommended plaintiff's discharge. (A-4).

Differences in treatment of plaintiff as a black correctional officer and white correctional officers were found by the trial court:

(1) Turney, a white correctional officer cursed plaintiff, his supervisor, with highly profane language because of a poor service rating. No disciplinary action was taken against the white

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<sup>2</sup>The other black shift commanders Greenlea, McAvoy and Woodward had been removed. (A-15, Note 1)

officer because Powell concluded that Turney was "merely venting justifiable frustration" (A-4, 5). When plaintiff, was provoked by Powell, his white supervisor, Powell was considerably more sensitive as the victim of insubordination (Note 4, A-5). This situation led to plaintiff's dismissal.

(2) Sharon Hefelee, a white shift commander violated one of the same rules that led to plaintiff's five days suspension and no disciplinary action was taken (A-5).

(3) Sharon Hefelee, was not disciplined when she left two security doors unlocked (A-5).

(4) John Newland, white, took a set of St. Mary's keys home with him and no disciplinary action was taken.

(5) Michael Doss, white, negligently permitted an inmate to escape and received only a letter of reprimand.

(6) Ratliff, white, let his brother come in the facility with a gun and no disciplinary action was taken.

(7) Ratliff and Slinkard, both white, failed to log the use of a St. Mary's vehicle and no disciplinary action was taken.

(8) Ratliff used an inmate to break into Supt. Long's office to get some passes and no disciplinary action was taken.

In addition to the specific situations mentioned above between December 1983 and December 1984 twelve blacks and one white were fired. (Note 6, A-6). Four of the twelve were supervisors (Greenlea, Carl MacAvoy, Charles Woodward and Hicks) and were replaced by whites (A-12). No white supervisors were fired. No black supervisors were hired and no blacks were promoted. Of the ten white employees on the custody roster five were promoted (Note 6, A-6). Twelve blacks were hired, however, Long had nothing to do with the hiring of CO-1s or clerk typists all of whom were hired by the Personnel Office in Jefferson City. At the time of the trial Long had been promoted

to an administrative office in the Department of Corrections and Vincent A. Banks the new Superintendent of the facility testified that no one at the Honor Center had anything to do with hiring CO-1s and clerk typists (3Tr. 46-49). As Superintendent, Long had authority to effectively recommend terminations (A-7) and also recommended promotions and hiring of CO-2s (shift commanders). As noted before no blacks were hired in supervisory positions in custody whereas 5 of the ten whites employed in custody were promoted (A-6). In addition to the above evidence a study conducted by the defendant agency in 1980-81 found that "too many blacks were in positions of power at St. Mary's" (Note 6, A-6). The trial court held that "Plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge." The court then went on to conclude that Hicks had not proven that "the crusade [to discharge him] was racially rather than personally motivated." (A-27). The district court stated, "Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race and entered judgment for defendants.

On appeal the Eighth Circuit reversed stating that when a plaintiff makes a prima facie case and defendant's proffered non-discriminatory reasons are shown to be pretextual plaintiff is not required to negate undisclosed reasons for which no evidence is presented. Under the circumstances of this case the Court of Appeals held that plaintiff was entitled to judgment and reversed the decision of the district court.

### SUMMARY OF ARGUMENT

Respondent disagrees with the question presented by the Petitioners and argues that the questions posed by the Respondent more accurately reflects the holding of the Eighth Circuit and the actual questions which are presented for review.



The Eighth Circuit decision is not in conflict with decisions of the Supreme Court of the United States. *McDonnell Douglas/Burdine* permits a plaintiff to establish proof of discrimination by the indirect method of proving that the defendant's proffered reasons for the adverse action(s) are pretextual. The inference of discrimination upon a showing of a prima facie case does not drop from the case merely because a defendant presents false testimony under oath in Federal Court as to the reasons for the adverse action(s).

The decision by the Eighth Circuit is not in conflict with other Circuits. None of the cases cited by petitioners has a similar factual situation where plaintiff as part of his proof of racial discrimination under *McDonnell Douglas/Burdine* was first required to disprove defendants' non-discriminatory/legitimate proffered reasons for the adverse action against the plaintiff, and secondly required to negate undisclosed reasons for the adverse action where no evidence in support of such undisclosed reason was offered by the defendant.

In addition to the above there was ample evidence of disparate treatment of plaintiff because of his race which justifies an inference of racial discrimination. This is evidenced by: (1) comparing the four blacks in supervisory positions fired as opposed to no whites; (2) the number of whites promoted (5); (3) the fact that plaintiff, a black shift commander was disciplined for minor offenses and white shift commanders were not disciplined for similar offenses and for more serious offenses were given only reprimands.

## **REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED**

St. Mary's Honor Center and Steve Long have filed a Petition For Writ of Certiorari in this Court contending that the decision of the Eighth Circuit is in conflict with the First and Seventh Circuits and applicable decisions of this Court.

### **I.**

#### **FAILURE TO PROPERLY DEFINE THE QUESTIONS PRESENTED FOR REVIEW**

The issue presented for review by the petitioners fails to present to this Court the actual holding of the case and fails to specifically identify the questions that this Court must review.

Respondent disagrees with the question presented by the Petitioners and states that the questions presented by Respondent more accurately presents the issues to be considered.

### **II.**

#### **THE DECISION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES**

In this case the District Court held that while Hicks had established a prima facie case, and had established that the reasons proffered by the defendants were false, that he had failed to disprove possible undisclosed reasons for the adverse action. The district court in its memorandum stated, "In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated" (A-27). *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244 (E.D. Mo. 1991).



The Eighth Circuit held that it was error for the district court to assume, without evidence to support the assumption that defendants' action were somehow personally motivated (A-10). *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992).

Petitioners argue in their brief, (Note 2, P-8) that the District Court did not adopt the "pretext-plus" approach to proof of racial discriminatory treatment cases. The issue then resolves itself down to whether, in order to prove pretext, plaintiff in addition to disproving the disclosed reasons must as part of his proof negate reasons undisclosed by the defendants and for which no evidence is offered by the defendants. When plaintiff failed to disprove undisclosed reasons could the district court ignore the inference of discrimination created by the prima facie case and proof of pretext of the disclosed reasons, and enter judgment for the defendants on the grounds that plaintiff had not established that the adverse actions were racially rather than personally motivated?

The Eighth Circuit held that when plaintiff had made a prima facie case and established that the non-discriminatory and legitimate reasons proffered by the defendants for the adverse actions were pretextual, it was error for the district Court to assume that some undisclosed reason for which no evidence was offered was the true reason for the adverse actions.

Defendants argue that when defendants give a reason, regardless of whether it is true or not, that the inference of discrimination drops from the case (P-8) and plaintiff must prove by direct or other indirect evidence that race was a motivating factor in the adverse action. Defendants' contention that *McDonnell Douglas/Burdine* so provides is a misstatement of these cases. *McDonnell Douglas v. Green*, 411 U.S. 792, 800 (1973), established the order and allocation of proof in a private non-class action challenging employment discrimination. First, Plaintiff must establish a prima facie case and establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee, *Texas Dept. of Community*

*Affairs v. Burdine*, 450 U.S. 248, 254. It is clear that if the employer is silent in the face of the presumption, the Court must enter judgment for the Plaintiff because no issue of fact remains in the case, *Burdine* at 254. To avoid a finding of discrimination, the Defendant must "clearly set forth, through the introduction of admissible evidence, the reason for the action", *Burdine* at 255. Then *Burdine* states that the employee can meet the ultimate burden of proving race discrimination either directly by persuading the Court that its discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's improper explanation is unworthy of credence.

The defendants in this case argue under their interpretation of *McDonnell/Burdine*, that indirect proof of discrimination provided by the second option of *Burdine* is no longer viable and that plaintiff must prove discrimination directly by persuading the Court that its adverse action was motivated by discriminatory reasons. The defendants misinterpret *Burdine*.

Defendants also argue that *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1978) is in conflict with the decision of the Eighth Circuit. The facts in *Aikens* were not similar to the facts in this case. In *Aikens* the Court of Appeals had held that the District Court had erred in requiring the employee to offer direct proof of discriminatory intent, and also erred when it required the employee to show, as part of his prima facie case, that the employee was as qualified or more qualified than the people who were promoted. On certiorari the Supreme Court held that the District Court erroneously thought that the employee was required to submit direct evidence of discriminatory intent and erroneously focused on the question of a prima facie case rather than directly on the question of discrimination, so that the Supreme Court could not be certain that the findings of fact of the District Court in favor of the employer were not influenced by the District Court's mistaken view of the law. Of significance is the statement by Justice Blackmun and concurred in by Justice Brennan which states:

I join the Court's opinion. I write to stress the fact, however, that as I read its opinion, the Court today reaffirms the framework established by *McDonnell Douglas Corp. v. Green*, (cite omitted), for Title VII cases. . . . This ultimate burden (proof of intentional discrimination) may be met in one of two ways. First as the Court notes, a plaintiff may persuade the court that the employment decision more likely than not was motivated by a discriminatory reason. . . . In addition, however, this burden is also carried if the plaintiff shows 'that the employer's proffered explanation is unworthy of credence. *Aikens*, 460 U.S. 717, 718.

The actual holding of the case was that under Title VII a plaintiff in a job discrimination case was not required to submit direct evidence of discriminatory intent to allow the court to reach the question of discrimination. Respondent submits that this holding is not in conflict with the decision of the Eighth Circuit in *Hicks*.

### III.

#### THE ALLEGED CONFLICT WITH THE FIRST & SEVENTH CIRCUITS

The Defendants claim the Court of Appeals holding in *Hicks* is in conflict with the United States Court of Appeals for both the First and Seventh Circuits. Defendants cite *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (7th Cir. 1987), *Samuels v. Raytheon Corp.*, 934 F.2d 388, (1st Cir. 1992) and *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991). A close study of these cases reveals substantial differences from *Hicks*. The district court held that the employer had lied about its proffered reasons for demoting and firing plaintiff, but that plaintiff had not proved that the crusade was racially rather than personally motivated (A-27).

*Shager* involved a situation where a discharged employee brought an age discrimination suit against his former employer and the trial court granted defendant's motion for summary judgment. The specific ruling which Judge Posner made was that a material fact issue existed which precluded summary judgment. The case does support the concept that the establishment of a prima facie case creates an inference of discrimination.

*Pollard* stands for the proposition that an adverse action for mistaken reasons honestly held is not pretext. The trial court found that the employer did not have good cause to fire its employee, *Pollard* at 559. The Seventh Circuit pointed out if an employer explained the reason behind its decisions, but the decision was ill informed or ill considered, the employer's explanation is not a pretext. Judge Esterbrook stated, because the District Court confused "mistake" with the word "pretext", its decision may not stand because pretext was not established. In the *Hicks* case, "pretext" was clearly established and therefore, *Pollard* is not in conflict.

In *Samuels*, the plaintiff established a prima facie case under the *McDonnell Douglas* formulation and the employer cited as its reason for the adverse action, that plaintiff failed to return to work after the medical department found her fit to resume her duties. The Court pointed out that there was a dispute as to whether or not plaintiff was disabled and stated that even if the employer was mistaken about whether or not she could or could not return to work, that the trial court could find that the decision was made in good faith and was not the basis for discrimination. In *Samuels*, no pretext was found whereas in *Hicks*, pretext was clearly established.

The case of *Villanueva v. Wellesley College*, involved a tenure situation where defendant was granted summary judgment. In *Villanueva*, the Court held that the plaintiff had failed to establish that she was qualified under the college or university standards and therefore, failed to make a prima facie case. *Villanueva* is not



comparable to *Hicks* for *Hicks* clearly made a prima facie case and proved pretext. In addition, *Hicks* presented evidence of other disparate treatment.

The First Circuit in the case of *Fields v. Clark University*, 966 F.2d 49 (1st Cir. 1992) involved a Title VII claim of sex discrimination in the denial of tenure to a teacher at the University. The First Circuit discussed plaintiff's method of proving discrimination after the employer had given its non-discriminatory reason in response to a prima facie showing. The Court stated:

The plaintiff then must have an opportunity to prove by a preponderance of the evidence that the defendant's proffered reason was merely a pretext for discrimination. *If she successfully demonstrates that such a pretext exists, she has proven defendant's commission of a Title VII violation; if she fails to do so, the presumption of discrimination drops from the case . . .* (emphasis added)

The First Circuit in the above decision holds that the presumption drops from the case only if a Plaintiff fails to prove pretext. This does not conflict with the Eighth Circuit's holding in *Hicks*.

The conflict of the circuits perceived by the Defendants, based on the cases cited, on close examination, becomes illusory. The decisions of this Court are in line with the decisions from other circuits. *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985); *Thornbrough v. Columbus & Greenville Ry. Co.*, 760 F.2d 633, 639-40 (5th Cir. 1985); *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987); *Caban-Wheeler v. ELSEA*, 904 F.2d 1549, 1554 (11th Cir. 1990); *Ibrahim v. N.Y. State Dept. of Health*, 904 F.2d 161, 168 (2nd Cir. 1990); and *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000 (3rd Cir. 1988).

The employer is required to clearly set forth, through the introduction of admissible evidence, the reason for the employ-

ment decision, *Burdine*, supra at 255. It is significant that neither Powell, Long or any other witness for the Defendants claim that there was any reason other than the reasons proffered. There is no evidence to support any violation of the Civil Service System, personal or political favoritism, random conduct or mistake such as existed in *Pollard*, supra.

The Eight Circuit recognized that the comparison of the treatment of supervisors with non-supervisory personnel was not determinative of non discriminatory action. It is significant that Long fired twelve (12) Afro-Americans and one (1) white. The fact that the Department of Personnel of the State of Missouri, an agency over which Long had no control, hired most of the twelve (12) Afro-Americans to replace those fired tells us nothing about the non discriminatory proclivity of Long. Note 6 on Page 6 of the Court's Opinion contains a report on Plaintiff's contention about discrimination against Black supervisors and a reference to the trial court's finding that a study of the Honor Centers for the Department determined that too many Blacks were in a position of power in St. Louis. Mr. Davis who did the study pointed out that in St. Louis, "the potential for subversion of the Superintendent's power — should the staff become racially polarized — is very real."

#### IV.

#### DISCRIMINATORY TREATMENT OF HICKS

The trial court ignored the wholesale dismissal of Blacks as compared to the dismissal of one white, and clearly erred when it found that Long had hired twelve blacks because Long had nothing to do with the hiring of entry level positions. *Hicks* was placed on the express train for termination by Long and Powell. He was abused, harassed, and mistreated for pretextual reasons. An inference of discrimination was established by his prima facie case. The trial court erred as a matter of law when it held that no inference of discrimination existed under the facts of this case.



Plaintiff established a prima facie case and proved that the employer's non discriminatory legitimate reasons were pretextual. The limited issue of whether a fact finder can ignore the inference of racial discrimination and make a determination that some reason undisclosed by the employer was the reason for the adverse action is not a matter of exceptional importance which warrants the granting of a writ of certiorari from this Court.

A review of the cases cited by defendants do not show a clear conflict between this case and the First and Seventh Circuits.

## CONCLUSION

The facts of this case were carefully reviewed by a three judge panel after full argument by the parties. The opinion reflects that the factual situation was carefully analyzed, and the law as applied to this case closely scrutinized. The opinion was carefully crafted and received the unanimous approval of all three members of the panel. A petition for rehearing was denied. The Court of Appeals righted a grievous wrong. Its decision when applied to the facts of this case correctly states the law and follows the applicable decisions of this Court. The decision of the Eighth Circuit is supported by *McDonnell Douglas/Burdine* and a host of other cases. It is not a matter of exceptional importance and the decision of the Eighth Circuit is not in conflict with other circuits.

*McDonnell Douglas v. Green* has been settled law for nineteen years and *Texas Department of Community Affairs v. Burdine* since 1981. Thousands of Federal and State cases and administrative decisions are predicated on the holdings in these cases. Settled law should only be changed under the most exigent circumstances.

For all of above reasons the petition for Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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